



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Major Norris G. Cotton--Variable Housing Allowance  
File: B-230318  
Date: April 18, 1990

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### DIGEST

A member who is entitled to Basic Allowance for Quarters (BAQ) at the with-dependent rate, based on his payment of child support, and who is also entitled to a Variable Housing Allowance (VHA), may not receive VHA at the higher with-dependent rate solely by reason of a separation agreement that also awards "primary custody" of dependent children to the former spouse, but with "temporary" and "physical" "secondary custody" to the member at other times. However, the member is entitled to VHA at the with-dependent rate where he can demonstrate that he had actual physical custody of the children for periods in excess of 3 months. The computation of such VHA should take into consideration only the member's direct housing costs and not the costs incurred by the former spouse.

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### DECISION

A United States Marine Corps Disbursing Officer requests an advance decision on whether a member otherwise eligible to receive Variable Housing Allowance (VHA) may receive it at the with-dependent rate (VHA-W) based on his children who for most of the year are in his former wife's custody.<sup>1/</sup>

As explained below, the member cannot receive VHA-W for the entire year; however, he may receive it for all periods in which he has actual physical custody for continuous periods in excess of 3 months.

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<sup>1/</sup> This request was submitted by L. T. Mullin, Head, Disbursing Division, Comptroller Department, Marine Corps Development and Education Center, Quantico, Virginia, through the Per Diem, Travel and Transportation Allowance Committee which assigned it Control No. 88-5.

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## BACKGROUND

On February 5, 1986, Major Cotton and his wife entered into a personal separation agreement which states that his wife has "primary custody" of the couple's three children and Major Cotton has "liberal visitation," as well as "temporary" and "physical" "secondary custody" for all non-school periods, plus at least 3 days a month during the school year. The agreement also provides that Major Cotton is required to pay \$300 child support per month per child, which he indicates he pays 12 months per year. A decree of divorce was entered on May 18, 1987, but the court did not modify any of the provisions of the separation agreement relating to custody. Major Cotton is not assigned government quarters and is entitled to basic allowance for quarters (BAQ) and VHA.

The Disbursing Officer raises questions concerning Major Cotton's entitlement to VHA-W under the circumstances described above subsequent to his May 18, 1987 divorce, and the housing costs to be considered in computing such entitlement, if any.

A member entitled to BAQ is also entitled to VHA whenever permanently assigned to duty in an area of the United States which is a high housing cost area with respect to the member. 37 U.S.C. § 403a(a)(1), and the Joint Federal Travel Regulations (JFTR), para. U8000-1. However, such a member with a permanent duty station in the United States, who is not assigned government quarters and who is authorized BAQ at the with-dependent rate solely because he or she is paying child support, is entitled to VHA only at the without-dependent rate. 37 U.S.C. § 403a(a)(4),<sup>2/</sup> and JFTR para. U8011-B. We are called upon here to determine

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<sup>2/</sup> The Defense Authorization Act, 1985, Pub. L. No. 98-525, § 602(d)(1), 98 Stat. 2492, 2534 (1984), added 37 U.S.C. § 403a as a separate codification of the VHA. This section also added limitations on receiving VHA when a member's entitlement is based on BAQ at the with-dependent rate solely due to court ordered dependent support. This limitation was amended by the Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 602 (a), 99 Stat. 583, 636 (1985), to provide that a member may be paid VHA only at the without-dependent rate whenever entitlement is premised solely on the payment of any child support, not just court ordered child support. See also H.R. Rep. No. 81, 99th Cong., 1st Sess. 217 (1985).

whether Major Cotton's entitlement to BAQ at the with-dependent rate is based "solely" on his payment of child support which would preclude him from receiving VHA at the with-dependent rate.

Major Cotton argues that his entitlement to BAQ at the with-dependent rate is not based solely on payment of child support. Instead, he indicates, he shares physical and financial custody of his children with his former wife and maintains a residence sufficient to accommodate them when they stay with him.

#### ANALYSIS

In Major Garry R. Scott and Captain Christopher Bonwich, 64 Comp. Gen. 224 (1985), circumstances somewhat similar to those in the present case were discussed. In that decision, one member (Bonwich) claimed BAQ at the with-dependent rate and VHA-W on the basis that he had extended visitation rights (4 months a year) with his natural child. He resided in private quarters, and during the periods when he exercised extended visitation, he did not pay child support to the former spouse who had custody of the child during the rest of the year. We held that, while the member could not receive BAQ at the with-dependent rate during the period of time that the child's mother had actual custody, since the child lived with her in government quarters, he was entitled to both BAQ and VHA at with-dependent rates when the child actually resided with him for more than a short visit. We further held that more than a short visit was a period in excess of 3 months, absent any regulation to the contrary.<sup>3/</sup> Accordingly, VHA-W entitlement exists when a dependent child resides in the private quarters of a member otherwise entitled to VHA at the without-dependent rate for periods in excess of 3 months.

In our opinion the same rationale applied in 64 Comp. Gen. 224, supra, ought to be applied to Major Cotton's case. On that basis he would be entitled to VHA-W upon a demonstration that his child or children actually lived with him in a nontemporary status, that is, for a continuous period in excess of 3 months. For other time periods his entitlement to BAQ at the with-dependent rate must be considered as

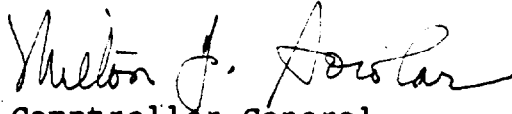
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<sup>3/</sup> The fact that in that case the member paid child support pursuant to court decree and Major Cotton is paying it pursuant to an agreement, makes no difference. See, footnote 2.

based solely on his payment of child support. See Department of Defense Military Pay and Allowances Entitlements Manual, para. 30236d; and 42 Comp. Gen. 642 (1963), and cases cited therein. The fact that he maintains a residence sufficient to accommodate his children would not entitle him to VHA-W when the children are in the custody of his former wife or visiting him for short periods.

We do not have sufficient information available to determine how long the children actually reside with Major Cotton; however, it appears that generally they do not remain with him for periods in excess of 3 months except possibly during the school recess in the summer months. The Disbursing Officer should obtain further information from Major Cotton in that regard and determine his entitlement accordingly.

The Disbursing Officer also asks whether the former wife's housing costs should be taken into consideration in computing Major Cotton's VHA-W. In this regard computation of his VHA-W entitlement, if any, should be based only on the costs for his own residence, not costs related to his former wife's residence. Although a substantial portion of the child support payments presumably are used by her to cover housing costs for the children, those are her direct costs and not direct costs of housing to Major Cotton for which VHA is intended to reimburse him. See JFTR para. U8002-F.



Acting Comptroller General  
of the United States